STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2005
v	No. 257032 Kalkaska Circuit Court
AUBREY THOMAS MCBRIDE, Defendant-Appellant.	LC No. 03-002413-FH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of arson of a dwelling house, MCL 750.72, and arson of insured property, MCL 750.75. He was sentenced to four to twenty years in prison for the arson of a dwelling house conviction, and to a concurrent sentence of 23 to 120 months in prison for the arson of insured property conviction. However, defendant was granted bond pending appeal. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions. Specifically, he argues that the prosecutor failed to present sufficient evidence that he caused the fire. We disagree. When reviewing a claim of insufficient evidence, we view "the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). We do not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

To obtain a conviction for arson of a dwelling house, the prosecution was required to show not only a burning of a dwelling house, but also that the burning resulted from an intentional criminal act. MCL 750.72. "Mere opportunity of a defendant to commit arson is insufficient to support a conviction of arson. To obtain a conviction under the statute, it is necessary to show that a dwelling house was burned by, or at the urging of, or with the assistance of, the defendant and that the fire was willfully or maliciously set." *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). To convict defendant of arson of insured property, the prosecutor was required to prove that the property was burned "with intent to injure and defraud the insurer." MCL 750.75. Evidence that the property is insured and that the defendant is in debt can support an inference of intent to defraud. See *People v Sanford*, 252 Mich 240, 254; 233 NW 192 (1930).

Further, "evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). "The prosecutor is not required to present direct evidence linking the defendant to the crime." *Id*. Rather, "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Id.*

In this case, the prosecutor presented evidence that defendant had a motive for burning his mobile home: he was in financial trouble, he had been unable to sell the mobile home, and he recently renewed his insurance policy on the mobile home. Further, the prosecutor presented evidence that defendant had the opportunity to set the fire in the mobile home. Defendant's girlfriend's sons testified that they stopped at the mobile home to use the bathroom several hours before the fire started and that defendant was in the back bedroom. There was testimony that defendant later admitted to more than one person that he may have left a candle burning in the mobile home when they left. Finally, the prosecution presented evidence that the fire was intentionally set. Its experts testified that there was evidence that there was a foreign substance in the soil underneath the back bedroom where the fire started and that they could find no accidental cause for the fire because there were no appliances or electrical lines in the area. They further testified that the burn patterns indicated that an accelerant was used to start fire; that there was an insufficient fire load in the back bedroom to account for the severity and intensity of the fire; and that a delay device, such as a candle, could have been used to start the fire. Viewing this evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to find that defendant committed the crimes of arson of a dwelling house and arson of insured property.

We note that defendant's experts' opinion testimony that the cause of the fire was accidental and that the origin was underneath the trailer does not necessitate a finding that there was insufficient evidence. *People v McClary*, 439 Mich 867; 475 NW2d 824 (1991) (finding that defendant's production of expert testimony contradicting the prosecution's expert does not render the prosecution's proofs insufficient); *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000) (stating that a disagreement between experts goes to the weight, not the legal sufficiency, of the evidence). Rather, because there was evidence supporting the prosecution's experts' opinions as to cause and origin, the jury was free to choose between the two theories with which it was presented. *Fletcher, supra* at 564. And, again, this Court will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id*. at 561.

Next, defendant argues that the verdict in this case was against the great weight of the evidence. Defendant asserts that the prosecution's experts' testimony contradicts the indisputable physical fact that no accelerant was found at the fire scene. We again disagree. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). When determining if a verdict is against the great weight of the evidence the trial court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

We reject defendant's argument because contrary to defendant's assertions, the prosecution's experts did not testify that an accelerant was found in the soil, which would have contradicted the allegedly indisputable scientific fact that no accelerant was found. But, rather, they testified that they believed an accelerant was used to start the fire based on the burn patterns and other evidence found throughout the mobile home. Further, there was testimony that while it could not be identified as an accelerant, there was a foreign petroleum-based substance in the soil samples taken from underneath defendant's mobile home, and there was also testimony that it is not uncommon for an accelerant to completely burn off and leave no physical evidence of its presence. Therefore, we see nothing in the experts' testimony that contradicts indisputable physical laws or facts. *Lemmon, supra* at 643. Accordingly, defendant has not established that the trial court abused its discretion by denying his motion for a new trial.

Finally, we agree with defendant that the trial court erred in not admitting his medical records under the business records exception to the hearsay rule, MRE 803(6), based on the trial court's finding of a lack of foundation. However, the trial court's error does not require reversal because it has not shown that this error affected his substantial rights.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, because defendant failed to make an offer of proof at trial, this issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MRE 803(6) the following are not excluded by the hearsay rule, even if the declarant is available to testify:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Further, this Court articulated the evidentiary foundation required to admit business records under MRE 803(6) in *People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984):

> For a proper foundation to be established for the admission of a document as a business record, a qualified witness must establish that the record was kept in the ordinary course of regularly conducted business activity and that it was the regular practice of such business activity to make the record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

These foundational requirements do not require presentation of either the actual author or someone else who can interpret the contents of the records. *People v Safiedine*, 152 Mich App 208, 217; 394 NW2d 22 (1986).

Here, defendant's witness testified that she was a file clerk and records copy person at the hospital and that she was very familiar with the medical records filing system. She further stated that defendant's medical records were kept in the regular course of business at the hospital. Therefore, because the foundational requirements of MRE 803(6) were met, the trial court erred in refusing to admit the records. However, we conclude that the trial court's error does not require reversal because defendant has not shown how the medical records would have helped his case and because the jury heard testimony from other witnesses that defendant went to the hospital for chest pains shortly after the fire. Thus, defendant has not shown plain error affecting his substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy